



Direct Dial: 020-7901-7412  
06 November 2003

Cc. All Interested Parties

Our Ref: SLC 18

Dear colleague,

**The request of Jade Power Generation Ltd (“Jade”) for disapplication of paragraphs 7 to 17 inclusive of Electricity Generation Standard Licence Condition 18 (“SLC 18”): Generating unit availability**

On 08 August 2003, EDF Energy submitted a formal request, to the Gas and Electricity Markets Authority (“the Authority”) seeking disapplication of paragraphs 7 to 17 inclusive of Electricity Generation Standard Licence Condition 18 (“SLC 18”) from the generation licence held by Jade Power Generation Ltd.

This letter explains the background to this issue and also invites views on the Authority’s provisional decision to consent to the disapplication request by Jade.

***Background***

**Background to SLC 18**

A licence condition similar in scope to SLC 18 was introduced following an investigation into Pool prices<sup>1</sup> carried out by the Office of Electricity Regulation (“OFFER”)<sup>2</sup> in 1991. The investigation concluded that certain generators with a large market share were able to exert undue influence on wholesale electricity prices, to the detriment of customers, through their generating unit availability declarations and decisions either to mothball or to close plant. Market participants also complained to OFFER that some generators were failing to offer for sale plant that they were proposing to mothball or close. A generating unit availability licence condition was, therefore, introduced into the licences of National Power,<sup>3</sup> Powergen and Nuclear Electric<sup>4</sup> explicitly to prohibit monopolistic or anti-competitive behaviour in relation to

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<sup>1</sup> “Report on Pool Price Inquiry” December 1991.

<sup>2</sup> OFFER merged with Ofgas (the gas regulator) in 1999 to form Ofgem.

<sup>3</sup> The precursor of Innogy and International Power.

<sup>4</sup> The precursor of British Energy and Magnox Electric.

such matters as the availability, closure and mothballing of plant. The condition also incorporated an obligation to publish information on plant availability, to provide transparency and assist OFFER in assessing licensees' compliance with the condition. Additionally, the licence condition enabled OFFER to appoint an Independent Assessor to determine whether a decision to close a station, in part or whole, was reasonable.

### **Standard licence condition 18**

On the designation of the standard licence conditions on 27 September 2001, SLC 18 replaced the previous licence condition. Following an extensive consultation process with licensees and other interested parties, SLC 18 was included as a standard licence condition in all generation licences, but only "switched on" for those licensees that had been subject to the previous licence condition.<sup>5</sup> SLC 18 provides for the condition to be "switched on" (become operative) or "switched off" (to be disappplied) in each of the individual generation licences. SLC 18 also specifies the procedures for considering a disapplication request. While Ofgem<sup>6</sup> can accept a disapplication request (such as Jade's), it does not have the power to reject one without further action. If, following consultation, Ofgem considers that the request should be rejected, then the matter must be referred to the Competition Commission.<sup>7</sup>

SLC 18 provides Ofgem with one method of ascertaining whether a licensee is pursuing a course of conduct, which is intended to, or likely to, have the effect of restricting, distorting or preventing competition in the generation or supply of electricity. It requires those licensees in whose licence it is applied, including Jade, to provide information to Ofgem comparing the actual availability of their plants to the information that they provide on planned availability to NGC under the terms of the Grid Code. In addition, it requires these licensees to use reasonable endeavours to provide six months notice of proposals to reduce materially (whether temporarily or permanently) the capacity of a generating unit. Additionally, as part of the condition, Ofgem can appoint an Independent Assessor to determine whether a decision to close a station, in part or in whole, is reasonable.

### ***Previous requests for disapplication***

As noted above, this is not the first disapplication request to be made under SLC 18. On 26 September 2002, 03 April 2003 and 10 April 2003, Powergen, British Energy and Innogy respectively, submitted formal requests<sup>8</sup> under SLC 18 to the Authority seeking disapplication of

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<sup>5</sup> As a result of various company changes these licensees are: British Energy Generation Limited, Magnox Electric Plc, (both previously part of Nuclear Electric), Deeside Power Development Company Limited, Innogy Plc and International Power Plc (all previously part of National Power), Powergen UK Plc, Diamond Power Generation Limited (licence since revoked), Emerald Power Generation Limited (licence since revoked) and Jade Power Generation Plc (all previously part of Powergen).

<sup>6</sup> Ofgem is the Office of the Gas and Electricity Market Authority. The terms "Ofgem" and "the Authority" are used interchangeably in this letter.

<sup>7</sup> Under paragraph 15 of SLC 18, if Ofgem does not make a reference to the Competition Commission in respect of the disapplication request before the beginning of a period of twelve months which ends on or before the disapplication date, Jade may serve on Ofgem a termination notice specifying that the provisions shall cease to have effect on either the disapplication date or such date as is specified in the notice.

<sup>8</sup> Powergen put forward two alternative disapplication requests in its submission:

- (i) To disapply paragraphs 7 to 17 inclusive of SLC 18.
- (ii) To disapply paragraphs 7 to 8 and 10 to 16 of SLC 18 but to continue to have paragraphs 9 and 17 operative.

Innogy formally requested the disapplication of paragraphs 7 to 17 inclusive of SLC 18 from its Generation Licence.

SLC 18 from their generation licences. In its application, Powergen argued that it was inequitable for this condition to be switched on in its licence when it is switched off in the licences of other generators of an equivalent size. Powergen contended that SLC 18 unfairly limits its commercial freedom in a very competitive generation market and requires it to provide advance notice of its commercial decisions to its competitors who do not have to make the same information available, which it believes is inappropriate. Innogy, in its application, made reference to its response to the Powergen consultation in which Innogy contended that SLC 18 should be removed as competition is established within the generation market and that Ofgem has a number of other routes for enforcing compliance. British Energy, in its application, made reference to the Authority's indication that it was minded to accept disapplication requests from other licencees that have SLC18 'switched on' in their electricity generation licence, and indicated that they also considered there to have been no material change in circumstance since the Authority's decision to disapply the condition in Powergen's licence.

On 19 February 2003, Ofgem issued a consultation document<sup>9</sup>, "Electricity Generation Standard Licence Condition 18: Generating Unit Availability", that invited interested parties' views on a number of issues concerning Powergen's disapplication request.

On 26 March 2003, the Authority decided to consent to the request by Powergen to disapply paragraphs 7 to 17 inclusive of SLC 18 in Powergen's Electricity Generation licence in accordance with paragraph 13 of SLC 18. In accordance with the terms of SLC 18 and Powergen's request, the disapplication will become effective from 27 March 2004.

Following receipt of both the Innogy and British Energy requests for disapplication of SLC 18 on 10 April 2003 and 03 April 2003 respectively, Ofgem considered that there had not been a material change in circumstances since the Authority's decision to accept Powergen's disapplication request. Therefore, in its subsequent consultation documents to interested parties seeking views on its provisional decision to consent to Innogy's and British Energy's disapplication requests, issued on 22 May 2003<sup>10</sup> and 10 July 2003<sup>11</sup> respectively, the Authority indicated that it was minded to consent to these disapplication requests and to disapply paragraphs 7 to 17 inclusive of SLC 18 in Innogy's and British Energy's Electricity Generation licences<sup>12</sup>

Following consideration of respondents' views to both these consultation letters, on 03 July 2003 and 02 October 2003, the Authority issued letters indicating its consent to the requests by Innogy and British Energy respectively to disapply paragraphs 7 to 17 inclusive of SLC 18 in their Electricity Generation licences<sup>13</sup>. In accordance with the terms of SLC 18 and these requests, the disapplication for Innogy will become effective from 14 October 2004 and the disapplication for British Energy will become effective from 03 October 2004

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British Energy formally requested the disapplication of paragraphs 7 to 17 inclusive of SLC 18 from its Generation Licence.

<sup>9</sup> This document is available on the Ofgem website ([www.ofgem.gov.uk](http://www.ofgem.gov.uk)) under the publications section.

<sup>10</sup> "The request of Innogy plc ("Innogy") for disapplication of all of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability".

<sup>11</sup> "The request of British Energy plc ("BE") for disapplication of all of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability".

<sup>12</sup> In accordance with paragraph 13 of SLC 18.

<sup>13</sup> In accordance with paragraph 13 of SLC 18.

On all these occasions, Ofgem reached its decision by considering carefully the other options it would have available if there were concerns that a company was seeking to manipulate the market to the detriment of consumers through changes in the availability of its generating plant. These include its powers under the Competition Act 1998. Ofgem has additionally considered its requirements for information to conduct market surveillance activities. Ofgem has the ability to require the provision of information to it from generation licensees under Standard Licence Condition 13, when performing its statutory functions, and also under Section 28 of the Electricity Act 1989 if it is of the opinion that a relevant obligation is being, or is likely to be, contravened. There is also the Grid Code requirement on market participants to submit accurate information to NGC<sup>14</sup>.

### Competition Act 1998

Ofgem has concurrent powers with the Director General of Fair Trading under the Competition Act 1998. The Competition Act 1998 introduced two prohibitions against anti-competitive behaviour. The Chapter I prohibition prohibits agreements between undertakings, concerted practices and decisions by associations that have the object or effect of preventing, restricting or distorting competition in the United Kingdom. In relation to the issues covered by SLC 18, an example of behaviour that might breach this prohibition includes (without limitation) collusion over market shares or agreements to limit capacity or output.

The Chapter II prohibition prohibits the abuse of a dominant position by an undertaking in the United Kingdom. Again without limitation, in the context of SLC 18 restricting available capacity could be an example of abusive behaviour if its intention was primarily to increase prices.

As described in the consultation document published on 19 February 2003, in order to commence an investigation under the Competition Act 1998, Ofgem must have reasonable grounds for suspecting that one of the prohibitions has been infringed. Among other things, this suspicion may be the result of complaints, or it may derive from Ofgem's own market surveillance or acquired knowledge. If an undertaking is found to be in breach of the Competition Act 1998, it can be fined up to 10% of its UK turnover.

It should, however, be noted that the Competition Act 1998 can only be invoked if there is an anti-competitive agreement or a company is abusing its dominant position.

### Electricity Generation Standard Licence Condition 13 and Section 28 of the Electricity Act 1989

Under Electricity Generation Standard Licence Condition 13 ('SLC 13'), the licensee is required to provide to Ofgem such information as Ofgem reasonably requires in order for it to perform its functions under either the Electricity Act 1989 or the Utilities Act 2000. Furthermore, this SLC 13 information provision requirement is additional to the power of the Authority to request information under or pursuant to any other licence condition. Additionally, section 28 of the

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<sup>14</sup> Further information with respect to the powers of the Authority under standard licence condition 13, Section 28 of the Electricity Act 1989, and the Grid Code is included in Ofgem's decision document on Powergen's request for disapplication of SLC 18; 'The requests of Powergen UK plc's ('Powergen') for disapplication of all or part of Electricity Generation Standard Licence Condition 18 ('SLC 18'): Generating unit availability', issued 26 March 2003.

Electricity Act 1989 provides Ofgem with further powers to request information from licensees in certain circumstances.

While the powers of the Authority in requesting information are wide, in general they put the onus on Ofgem to request it whereas SLC 18 requires the licensee to provide information routinely. Nonetheless, Ofgem is of the view that the same information (or more) that licensees have to provide under SLC 18 can be reasonably required of licensees under SLC 13 and under section 28 of the Electricity Act 1989.

### Grid Code obligations

Under Standard Licence Condition 5 of their Electricity Generation licences, generators must comply with the provisions of all relevant Grid Codes.

Under the Planning Section of NGC's Grid Code, users must supply certain information to NGC in order for it to undertake the planning and development of the transmission system (including enabling it to publish its "Seven Year Statement" in accordance with its Transmission Licence).

Under the Operating Section of NGC's Grid Code, users must supply NGC with further information related to NGC's operation of the system (including in relation to the coordination of outages).

Whilst Ofgem is not routinely supplied with the information provided by users under the Grid Code, it can request this information (and other information) under Standard Licence Condition 11 of NGC's Transmission Licence, or SLC 13 of the appropriate Generation Licence.

Ofgem noted that some respondents to the Powergen consultation document published on 19 February 2003 were concerned that it would not have sufficient powers to investigate the availability of plant if SLC 18 were disappplied or removed. However, as the preceding discussion has made clear, Ofgem has alternative powers in relation to anticompetitive behaviour. Ofgem additionally is committed to ongoing surveillance of the wholesale electricity market. Nonetheless, given some respondents' concerns and the evolving market conditions, Ofgem considered that, on balance, it was more appropriate to disapply the condition from Powergen, Innogy and British Energy's electricity generation licences rather than remove it by licence modification.

The wholesale electricity market is continuing to evolve and this is another reason why Ofgem considered that allowing Powergen, Innogy and British Energy's disapplication request was a more appropriate response.

In relation to confidence in the regulatory environment, Ofgem was of the view that disapplication rather than complete removal was likely to have a beneficial effect. It was considered that disapplication would reduce the regulatory burden on Powergen, Innogy and British Energy, and, subject to there being no material changes or unique circumstances, on any other generators who apply for SLC 18 to be disappplied. This is because once SLC 18 is disappplied, requests for information on plant availability and mothballing/closure decisions will

only be made when required by Ofgem to discharge its statutory functions. At the same time, Ofgem's ability to "switch on" the condition, following its disapplication as a result of the requested disapplication direction, should give smaller market participants and suppliers confidence that appropriate regulatory action can be taken with regard to plant availability, should this prove necessary. The consultations also pointed out that, if Powergen, Innogy and British Energy's disapplication requests were accepted, then SLC 18 could only be "switched on" again at a later date by a direction issued by the Authority.<sup>15</sup>

In the Powergen consultation document, Ofgem recognised Powergen's concerns surrounding the current application of SLC 18. It also stated that in the absence of compelling reasons to switch on SLC 18 in all generation licences, Ofgem was minded to accept one of Powergen's disapplication requests. Further, Ofgem indicated that it would be minded to accept disapplication requests from other licensees that have SLC 18 "switched on" in their Electricity Generation licence, if such requests were presented to Ofgem, unless there was evidence of a material change in circumstances or the request had unique issues that warranted further consultation.

### ***EDF Energy's requests for disapplication***

Ofgem considers that in the case of Jade Power Generation Ltd's request for disapplication of SLC 18 there has not been a material change in circumstances since we reached the decision to accept British Energy's disapplication request. Additionally, we do not consider there to be any unique issues that warrant further consultation in respect of Jade's request for disapplication of paragraphs 7 to 17 inclusive of SLC 18.

Therefore the Authority is minded to consent to the request by Jade to disapply paragraphs 7 to 17 inclusive of SLC 18 in Jade's Electricity Generation licence in accordance with paragraph 13 of SLC 18. In the event that that Authority does consent to Jade's request, the disapplication will become effective from 08 February 2005.

### ***Views invited***

Interested parties are requested to submit views on the Authority's provisional decision to consent to the disapplication request by 5pm on 05 December 2003.

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<sup>15</sup> In accordance with the terms of paragraph 2 and 3 of SLC 18.

Responses should be addressed to:

Dr Boaz Moselle  
Managing Director - Competition & Trading Arrangements  
Office of Gas and Electricity Markets  
9 Millbank  
London  
SW1P 3GE

Electronic responses may be sent to: [tracey.hunt@ofgem.gov.uk](mailto:tracey.hunt@ofgem.gov.uk)

Respondents are free to mark their replies as confidential although Ofgem would prefer, as far as possible, to be able to place responses to this paper in the Ofgem library. Unless clearly marked 'confidential', responses will be published by placing them in the Ofgem library and on the Ofgem website.

If you have any queries in relation to the issues raised in this letter, please feel free to contact me on the above number or alternatively contact Jo Witters on 020 7901 7159.

Yours sincerely,

**Sonia Brown**

**Director, Electricity Trading Arrangements**

Signed on behalf of the Authority and authorised for that purpose by the Authority